Sup. Ct. # 83875

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

BRUCE D. THOMPSON,

Appellant.

Appeal from the Judgment and Sentence
of the Circuit Court of Jackson County, Missouri
16th Judicial Circuit
The Honorable Justine E. Del Muro, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

On May 27, 1999, after a jury trial, Appellant, Bruce Thompson, was convicted in the Circuit Court of Jackson County, the Honorable Justine E. Del Muro presiding, of one count of the class A felony of murder in the second degree, Section 565.021.1, RSMo 1994, and one count of the felony of armed criminal action, Section 571.015, RSMo 1994.[1] On July 16, 1999, Judge Del Muro sentenced Mr. Thompson to consecutive terms of life plus fifteen years imprisonment, respectively.

Mr. Thompson timely filed a Notice of Appeal on July 20, 1999. On June 5, 2001, the Missouri Court of Appeals, Western District, affirmed the convictions en banc. On June 20, 2001, Mr. Thompson timely filed a motion for rehearing, or in the alternative, application for transfer, which was denied on July 24, 2001. On August 8, 2001, Mr. Thompson timely filed an application for transfer in this Court. On September 27, 2001, this Court sustained Mr. Thompson's application for transfer. Jurisdiction therefore lies in the Supreme Court of Missouri.

[1] All references are to RSMo 1994, unless otherwise noted.

STATEMENT OF FACTS

Lynn Thompson and Wesley Joe McLaughlin ("Joe") had two children, Wesley and Sharday (Tr. 241, 265). Lynn and Joe split up shortly after Sharday was born, but they shared custody of the two children (Tr. 242).

After the breakup, Lynn became romantically involved with Bruce Thompson (Tr. 243). They dated for several years and lived together at 7417 College, in Kansas City, Jackson County, Missouri (Tr. 243, 243, 318, 331). Their two-year-old daughter, Raylynne, lived there also (Tr. 241, 267). Wesley (who was thirteen) and Sharday (who was eleven) lived with Bruce and Lynn during the week, and with Joe on every other weekend (Tr. 243-45, 267, 282). If Joe wanted to see Wesley and Sharday, he would contact Lynn's mother, Betty, and pick the children up from Betty's house (Tr. 244, 257, 302). Joe would drop the children off at Betty's on Sunday evenings, and Lynn would pick them up from there and take them home (Tr. 245). By agreement, Joe would not go to Lynn's house, so that there would be no problems between Joe and Bruce (Tr. 244, 247, 302).

In July, 1997, Lynn and the children moved out of the house (Tr. 267). They lived with Betty for a week or two and then moved back in with Bruce (Tr. 268, 316).

On the weekend of September 20 and 21, 1997, Joe had custody of the children (Tr. 246). On Sunday the 21st, at around 11:00 in the morning, Lynn went to Betty's house to take Betty to the store (Tr. 305). Because Lynn's car was low on gas, they took Lynn's brother's car, a white Pontiac (Tr. 305). Afterwards, Lynn had some housework to do, so she told Betty that she would do her work, pick up Raylynne, and come back to

Betty's house (Tr. 306, 314). At about 2:30, Lynn left in her brother's white Pontiac (Tr. 306-307). Lynn did not return (Tr. 307).

Between 6:00 and 6:30 that afternoon, Joe dropped Wesley and Sharday off at Betty's house (Tr. 246, 282, 307). Usually, Lynn would be there at about the same time to pick the children up, or she would call to say she would be late (Tr. 248, 308). When Lynn had not called or shown up, Betty called Joe to tell him that Lynn had not picked up the children (Tr. 246, 283, 308). Betty asked Joe to take one of the children by Lynn's house to see if Lynn was there (Tr. 246, 283). Joe picked up Sharday, and they drove by Lynn's house (Tr. 247, 258, 283, 309). There was no car in the driveway, but a television was on in a bedroom (Tr. 247). Joe dropped Sharday back at Betty's house (Tr. 247). They thought that perhaps Lynn had gone out to celebrate her birthday, which had been the day before (Tr. 248, 284, 303, 309).

Usually, on weekdays, Lynn would drop Wesley, Sharday, and Raylynne off at Betty's house very early in the morning so that Lynn could get to work (Tr. 309-10). Wesley and Sharday would catch the bus to school from Betty's house, and Betty would baby-sit Raylynne (Tr. 310). On Monday the 22nd, however, Lynn did not show up with Raylynne, and Lynn's boss told Betty that Lynn had not shown up for work (Tr. 309-10).

Betty called Joe and told him that Lynn still had not been by the house and had not shown up for work (Tr. 248, 259, 286, 310). Joe picked Wesley up from Betty's house and went to Lynn's house (Tr. 248). They walked around the house and checked the doors, which were locked (Tr. 248-49, 286-87). No one appeared to be home (Tr. 249, 259, 287). Neither Wesley nor Sharday had keys to the house (Tr. 273). Joe and Wesley

then returned to Betty's house (Tr. 249, 288). Joe unsuccessfully searched the neighborhood to see if anyone had seen Lynn, while Betty made phone calls trying to locate her (Tr. 249-50, 310).

Joe and Betty called the police and asked them to come to Lynn's house to check on her welfare (Tr. 250, 263, 311). Joe and Wesley were waiting outside Lynn's house when the police arrived at 9:30 that morning (Tr. 222-23, 229, 251, 288). The officers checked the house for signs of forced entry, but found none (Tr. 223, 333, 337). Three windows were open (Tr. 230). Wesley climbed through one of the open windows and unlocked the front door for the officers (Tr. 224, 231, 252, 264, 288).

The officers went into the house to look for Lynn (Tr. 224). The house had one floor with an attached garage, which led to a basement (Tr. 225, 338-39). No one was on the main floor of the house, although the television was on and the keys to the Pontiac were on top of the television (Tr. 225, 275). The kitchen had a messy spill on the floor, but the house was neat otherwise (Tr. 225). The Pontiac was parked in the garage (Tr. 225).

The officers went through the garage to the basement (Tr. 226). Their attention was drawn to a washroom, because a pipe was broken and water was spilling out (Tr. 233). Nearby, the officers saw what appeared to be a pile of clothes on the floor (Tr. 226, 237). Upon closer inspection, the officers realized that pile of clothes was actually Lynn, covered by a sheet (Tr. 226-27, 357). She appeared to be dead (Tr. 227). The officers left the house, told Joe what they had found, and instructed him not to leave the scene (Tr. 227, 253-54, 264).

The police determined that Lynn died as the result of two stab wounds to her right breast, either one of which would have been fatal (Tr. 616-17, 622). She had a stab wound to her abdomen and five defensive type wounds on her arms, hand and one leg (Tr. 618-19, 622-23). She had some cuts and scrapes, as well as marks on her neck that appeared to be caused by fingers (Tr. 623-24, 640). Lynn died sometime between 4:00 Sunday afternoon and 7:15 Monday morning (Tr. 640).

Lynn's body was found in a pool of blood (Tr. 357). There was blood on the wall directly behind her and on some boxes next to her (Tr. 358). Bloody shoe prints had been left near her body and trailed off as they approached the top of the basement steps (Tr. 354, 358-59, 500). Although a shoe tread pattern was visible, the police could not determine what shoe left the bloody prints (Tr. 359, 502, 597-98). There was blood on the back of the basement door and on the doorknob (Tr. 355). The police collected the doorknob as evidence (Tr. 355).

In the garage were two shoe impressions in a white chalky substance on the step into the garage (Tr. 347). These appeared to be made by Lynn's shoes (Tr. 406). They did not match the tread of the bloody shoe prints (Tr. 606-607, 669-70).

The police found several drops of blood on the bathroom floor; several drops of blood on the trash bag in the bathroom trash can; a drop on the kitchen floor; a drop on the doorstrip between the kitchen and the garage; a drop near the steps into the garage; several more drops of blood on the floor in front of the car; a drop of blood on a trash bag in the garage near the railing leading down to the basement; a drop of blood collected from near the rear bumper of the car; and a few more drops of blood on the landing at the

top of the basement stairs (Tr. 341-42, 344, 346, 348-49). The drops were collected as evidence (Tr. 341-42, 344-35, 347-49).

DNA testing was conducted on the spot of blood from bathroom floor; the blood from the bathroom trash bag; two spots from the garage floor; the doorknob; and blood taken off the furnace duct in the basement (Tr. 649-55). The two spots of blood from the bathroom, the blood stain from the garage, and the doorknob matched Bruce (Tr. 683). The blood on the furnace duct matched Lynn (Tr. 683).

In the washroom was Lynn's purse and its contents strewn on the floor (Tr. 236, 360). Pieces of wood, which appeared to have been freshly broken, were on the floor (Tr. 361). One of Lynn's earrings lay on the floor by the washing machine (Tr. 361). There were more drops of blood in the washroom (Tr. 360-61).

No murder weapon was found in the house (Tr. 420). There were no bloody clothes, no bloody towels, and no bloody messes other than the isolated drops of blood (Tr. 426-27). The police could not determine how old the blood drops were (Tr. 436).

Numerous fingerprints were lifted from inside the house (Tr. 364-65). Only two were prints of value - one from the front storm door and another was from the top of the Pontiac's trunk (Tr. 473-74). Neither of the prints matched either Lynn or Bruce (Tr. 474-75). The two prints have not been identified (Tr. 476).

A neighbor told the police that she saw Lynn and Raylynne wash the Pontiac in the driveway in the late the afternoon on Sunday and then go inside (Tr. 448, 450). At around 7:00 that evening, the neighbor saw Bruce leave the house with Raylynne, drive off in the Pontiac, and return ten or fifteen minutes later (Tr. 451-54, 460). She saw him

leave later in his Volvo and return again ten minutes later (Tr. 453-54). The neighbor saw Bruce leave again five minutes later with a black duffel bag which he put in the trunk of the Volvo before driving off (Tr. 454-55).

After Lynn's body was found, local television news broadcasted Lynn's death and advised that the police were looking for Raylynne and Bruce (Tr. 547-48). Bruce's sister, Edwinna, contacted the police to advise them that she had been baby-sitting Raylynne (Tr. 516-17). Edwinna explained that she occasionally would baby-sit Raylynne while Bruce ran errands (Tr. 511). On Sunday, the 21st, around 8:00 or later, Bruce came by Edwinna's house with Raylynne (Tr. 512). He asked Edwinna if she would baby-sit Raylynne while he ran an errand (Tr. 513). Bruce was acting normal and had no scratches, cuts, or blood on him (Tr. 523-24). He did not return to pick up Raylynne, which was unusual (Tr. 513-14).

The police searched Bruce's Volvo (Tr. 484). They found a pager in the car (Tr. 484). A preliminary test revealed the possible presence of blood on the steering wheel, the front left seat, and the plastic next to the door (Tr. 486, 491). Later, an expert looking for the presence of blood on these items could not find any after all (Tr. 656, 691).

The police searched the house of Bruce's brother Greg (Tr. 581). The detectives found a black duffel bag, but later determined that it was not the black bag that Bruce carried from his house on Sunday evening (Tr. 573-77, 642). They also found a large knife, which was submitted for testing (Tr. 582-83). Testing on the knife determined the possible presence of blood (Tr. 657). The police placed a tap on the phones of both Edwinna and Greg, to learn who called their respective houses (Tr. 555-56).

Bruce surrendered himself to the police 49 days after Lynn's body was found (Tr. 557). He agreed to speak with the police and denied any wrongdoing (Tr. 560, 578). His demeanor was inquisitive (Tr. 578). Bruce's shoes did not appear to have the same tread as those that made the bloody footprints (Tr. 561). The police took samples of Bruce's blood and hair samples (Tr. 561-62). They noted apparent scars and scratching on Bruce's hands and photographed them (Tr. 562-64, 579). The police released Bruce, but later issued an arrest warrant for him (Tr. 580). He again voluntarily surrendered himself to the police (Tr. 580).

The State charged Bruce with one count of the class A felony of murder in the second degree and one count of the felony of armed criminal action (L.F. 7-9). Prior to trial, the State filed a motion in limine, asking the court to limit defense counsel's opening statement to evidence that the defense would elicit within the defense case (L.F. 15-17; Tr. 181-89). Defense counsel argued that the defense had subpoenaed several of the same witnesses as the State and expected to elicit exculpatory evidence from those witnesses (Tr. 182-84). The court sustained the State's motion (Tr. 186, 189, 219-21). As a result, after the State gave its twenty-five page opening statement, the defense was limited to a four line opening statement (Tr. 194-221).

At trial, evidence was presented as set forth above. Bruce did not testify nor present any defense witnesses. The court overruled defense counsel's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence (Tr. 721, 724).

During closing argument, the State argued several times that Bruce took Lynn's pager with him while he disposed of evidence, so that he could keep track of who was trying to contact Lynn (Tr. 750-51, 763-64). Defense counsel did not object to the argument (Tr. 750-51, 764). During deliberations, the jurors sent the court a note asking whose pager was found in the Volvo (Tr. 815). The court instructed the jury to remember the evidence as it was presented at trial (Tr. 815).

The jury convicted Bruce of both counts (Tr. 816). The court overruled Bruce's motion for new trial and sentenced him to consecutive terms of life plus fifteen years imprisonment, respectively (Tr. 837, 839).

Bruce appealed his convictions to the Court of Appeals for the Western District (L.F. 55-58). In an en banc decision, the Court of Appeals held that the trial court erred in barring defense counsel from making an opening statement, but that Bruce did not suffer prejudice warranting a reversal. State v. Thompson, 2001 WL 603529, at 8-10. The Court of Appeals recognized that both the Eastern and Western Districts had "created an absolute rule that *any* evidence defendants intend to elicit on cross-examination of the State's witnesses constitutes argument, and, therefore, cannot be mentioned in opening statements." *Id*., at 6 (emphasis in original). The Court of Appeals concluded that the absolute rule precluding defense counsel from making an opening statement regarding factual evidence it intends to elicit on cross-examination of State witnesses goes beyond the prohibition against argument in opening statements. *Id*., at 8. The Court of Appeals held that its prior decisions that espoused such a rule should no longer be followed. *Id*. The appellate court found that Bruce did not suffer prejudice by

the court's denial of an opening statement, however, because defense counsel was able to thoroughly cross-examine the witnesses regarding the facts underlying the defense theory and emphasize the significance of that evidence in closing argument; and since the defense theory was not so complex as to require advance "elucidation." *Id*., at 9-10.

The Court of Appeals also held that the evidence was sufficient to support the convictions and that the trial court did not err in failing to declare a mistrial *sua sponte* after the State referred to matters outside the evidence in closing argument. *Id*., at 5, 11.

Bruce timely filed a motion for rehearing, or in the alternative, application for transfer, which was denied. This Court sustained the application for transfer that Bruce subsequently filed.

POINT I

The trial court erred in 1) overruling Bruce Thompson's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence; 2) in accepting the guilty verdicts; and 3) in sentencing Bruce, because the State failed to prove Bruce guilty beyond a reasonable doubt of either murder or armed criminal action, in violation of Bruce's right to due process of law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not establish that it was Bruce who stabbed Lynn Thompson to death. Even in the light most favorable to the State, the evidence demonstrated merely that the police could not locate Bruce for 49 days after Lynn's body was found and that drops of his blood were found within his home, and such evidence simply is not sufficient to support the convictions.

In re Winship, 397 U.S. 357, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970);

State v. Daleske, 866 S.W.2d 476 (Mo. App. 1993);

Jackson v. Virginia, 443 U.S. 316, 99 S.Ct. 2781, 61 L.Ed.2d 500 (1979);

U.S. Const., Amends. V, VI and XIV; and

Mo. Const., Art. I, Section 10.

POINT II

The trial court abused its discretion in limiting defense counsel's opening statement to only evidence that would be presented in the defense case, in violation of Bruce's rights to due process of law, to a fair trial, to equality under the law, and to appear and be defended by counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution, and in violation of Missouri Supreme Court Rule 27.02(f) and Section 546.070(2), RSMo 1994, in that certain of the "State witnesses" could just as easily have been deemed "defense witnesses" but for the fact that the State's case proceeded first, and it was fundamentally unfair to prohibit the defense from apprising the jury of the exculpatory evidence that would be elicited from those witnesses, after the State was able to apprise the jury of the inculpatory evidence that would be elicited from those witnesses.

Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991);

Arriaga v. Texas, 804 S.W.2d 271 (Tex. Crim. App. 1991);

Hays v. Missouri Pac. R. Co., 302 S.W.2d 800 (Mo. 1957);

State v. Harris, 731 S.W.2d 846 (Mo. App. 1987);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Secs. 2, 10, and 18(a);

Section 546.070, RSMo 1994; and

Mo. Sup. Ct. Rule 27.02.

POINT III

The trial court plainly erred and abused its discretion in failing to declare a mistrial *sua sponte* during the State's closing argument when the assistant prosecuting attorney urged the jurors to consider facts that were neither in evidence, nor could they be considered reasonable inferences from the evidence, in violation of Bruce's right to due process of law, to confront and cross-examine the witnesses against him, and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the State urged the jurors to believe that the pager found in Bruce's car was Lynn's pager taken by Bruce after he killed Lynn so that he could keep track of who was trying to reach her while he was disposing of the evidence of his crime. None of this wild allegation was supported by the evidence at trial, yet the jurors obviously must have considered it in finding Bruce guilty, since they requested clarification of the issue during their deliberations.

State v. Tiedt, 357 Mo. 115, 206 S.W.2d 524 (Mo. banc 1947);

State v. Burnfin, 771 S.W.2d 908 (Mo. App. 1989);

State v. Storey, 901 S.W.2d 886 (Mo. banc 1995);

U.S. Const., Amends. V, VI, and XIV;

Mo. Const., Art. I, Secs. 10 and 18(a); and

Mo. Sup. Ct. Rule 30.20.

ARGUMENT I

The trial court erred in 1) overruling Bruce Thompson's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence; 2) in accepting the guilty verdicts; and 3) in sentencing Bruce, because the State failed to prove Bruce guilty beyond a reasonable doubt of either murder or armed criminal action, in violation of Bruce's right to due process of law, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the State did not establish that it was Bruce who stabbed Lynn Thompson to death. Even in the light most favorable to the State, the evidence demonstrated merely that the police could not locate Bruce for 49 days after Lynn's body was found and that drops of his blood were found within his home, and such evidence simply is not sufficient to support the convictions.

The trial court erred in overruling Bruce Thompson's motions for judgment of acquittal at the close of the State's case and at the close of all the evidence, in accepting the guilty verdicts, and in sentencing him on the charges. The State failed to prove beyond a reasonable doubt that it was Bruce who stabbed Lynn to death in the basement of their home. The evidence in the light most favorable to the State showed merely that the police could not find Bruce for 49 days after Lynn's body was found and that drops of his blood were found within his home. This evidence simply is not enough to support convictions for either second-degree murder or armed criminal action.

To support a criminal conviction, the State must prove beyond a reasonable doubt that the defendant committed each element of the crime charged. In re Winship, 397 U.S. 357, 362, 90 S.Ct. 1068, 1071, 25 L.Ed.2d 368 (1970); U.S. Const., Amends VI and XIV; Mo. Const., Art. I, Section 10. In reviewing the sufficiency of the evidence, this Court must determine whether there is substantial evidence from which a reasonable juror could find the defendant guilty beyond a reasonable doubt. State v. Daleske, 866 S.W.2d 476, 478 (Mo. App. 1993), *citing* State v. Dulany, 781 S.W.2d 52, 55 (Mo. banc 1989). "Substantial evidence" is evidence from which a trier of fact can find the issue in harmony with the verdict. Daleske, 866 S.W.2d at 478, *citing* State v. Martin, 852 S.W.2d 844, 849 (Mo. App. 1992). This Court may not weigh the evidence or determine the credibility or reliability of witnesses. Daleske, 866 S.W.2d at 478, *citing* State v. Middleton, 854 S.W.2d 504, 506 (Mo. App. 1993). This Court must review the facts in evidence, as well as all inferences reasonably drawn from the evidence, in the light most favorable to the verdict and must disregard all evidence to the contrary. Daleske, 866 S.W.2d at 477.

The State failed to present substantial evidence that Bruce was the person who murdered Lynn. The murder occurred anytime from 4:00 in the afternoon on Sunday, to 7:15 Monday morning (Tr. 640). No one saw Bruce and Lynn struggle or heard any indication of a struggle. No evidence was presented that Bruce and Lynn had not been getting along in the weeks prior to her death. Although Lynn and the children previously had moved out of the house, they were only gone a week or two before moving back in with Bruce, and that occurred over two months prior to Lynn's murder (Tr. 267-68, 316).

Despite the fact that there were no signs of forced entry into the house, someone other than Bruce could have entered the house through the garage or any of the three open windows (Tr. 223, 230, 333, 337). In fact, Wesley had no problem gaining access to the house through one of the two windows that were open in the front of the house (Tr. 224, 231, 252, 264, 288). Lynn's purse was on the floor near her body, with its contents strewn on the floor (Tr. 236, 360). Although her coin purse was still there, no cash was present (Tr. 412-13). Additionally, the police tried to match the fingerprints found in the garage and at the front door with Bruce and Lynn, but were unable to, so the identity of the person who left the fingerprints remains a mystery (Tr. 473-76).

Bruce Thompson acknowledges that he did not surrender himself to the police for 49 days after Lynn's body was discovered (Tr. 557). No evidence was presented, however, that Bruce actually fled from the police. Even if Bruce's absence could be considered analogous to flight, that only could be considered to indicate *some* consciousness of guilt. State v. Petrone, 836 S.W.2d 484 (Mo. App. 1992). Reasonable jurors could not take the leap of faith that simply because Bruce was not willing to immediately subject himself to questioning about the death of his loved one, he must have killed her.

The drops of Bruce's blood found within his home also cannot be considered proof that he murdered Lynn (Tr. 341-42, 344, 346, 348-49, 683). Bruce was a handyman by trade (Tr. 318). It is very feasible that over the time that he lived at the house, or even in the weekend that the murder happened, while Lynn was with her mother and Wesley and Sharday were with Joe, Bruce had cut his hand while working

with tools in the garage or basement. Many of the drops of blood were very small and hard to see, and so they might not have been noticed and cleaned up as quickly as if they had been more noticeable (Tr. 341, 650-56). After all, crime scene investigator Kim Orban testified that, in order to see the blood drops on the bathroom floor, she had to shine her flashlight on the floor (Tr. 341). This is not an action that would have been taken in the normal course of housecleaning, even in a very clean house. The fact that drops of Bruce's blood were found within his own home is not dispositive of whether he killed Lynn.

In short, the State failed to present sufficient evidence to prove that it was Bruce who murdered Lynn. From start to finish, the State admitted that its case against Bruce was circumstantial (Tr. 88, 173, 741). The State attempted to make the case seem stronger in closing argument by referring to matters outside the evidence and wildly speculating about what might have happened before, during and after Lynn's murder (Tr. 744, 750-51, 761, 763-64, 803-804, 806, 810). Reasonable jurors, however, could not find Bruce guilty beyond a reasonable doubt based merely on his unexplained absence and the fact that a few drops of his blood were found within his own home. The State's case, founded on that evidence alone, was simply too weak to support the convictions for either second-degree murder or armed criminal action.

Bruce Thompson was convicted on evidence that is not sufficiently substantial to support his conviction for either murder in the second degree or armed criminal action, in violation of his right to due process of law. U.S. Const., Amends. V, VI, and XIV; Mo. Const., Art. I, Sec. 10; Jackson v. Virginia, 443 U.S. 316, 99 S.Ct. 2781, 61 L.Ed.2d 500

(1979). The State failed to prove beyond a reasonable doubt that it was Bruce who murdered Lynn Thompson, and thus Bruce's convictions for second-degree murder and armed criminal action cannot stand. Bruce Thompson therefore respectfully requests that this Court reverse his convictions and vacate his sentences.

ARGUMENT II

The trial court abused its discretion in limiting defense counsel's opening statement to only evidence that would be presented in the defense case, in violation of Bruce's rights to due process of law, to a fair trial, to equality under the law, and to appear and be defended by counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10, and 18(a) of the Missouri Constitution, and in violation of Missouri Supreme Court Rule 27.02(f) and Section 546.070(2), RSMo 1994, in that certain of the "State witnesses" could just as easily have been deemed "defense witnesses" but for the fact that the State's case proceeded first, and it was fundamentally unfair to prohibit the defense from apprising the jury of the exculpatory evidence that would be elicited from those witnesses, after the State was able to apprise the jury of the inculpatory evidence that would be elicited from those witnesses.

> Opening statements are not evidence. They are just words. But words have great power. They can open minds or close them, make people think or make people mad, win cases or lose them. Though what you say is not evidence, your opening statement may have as much or more impact on the jury than any one thing a witness says.[2]

[2] Clinkscale, McKnight, and Gibson, Home Field Advantage: The Opening Statement that Closes, *Litigation*, Fall 2000.

The trial court abused its discretion in drastically limiting the scope of defense counsel's opening statement to the extent that it rendered the opening statement meaningless. The defense was not allowed to present to the jury the nature of the defense or outline the evidence the defense anticipated eliciting and the significance of that evidence. The jury was left to hear the evidence with the false impression that the defense had no evidence to speak of. By preventing the defense from making a meaningful opening statement, the trial court violated Bruce's rights to due process of law, to a fair trial, to equality under the law, and to appear and be defended by counsel, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 2, 10 and 18(a) of the Missouri Constitution, and in violation of Missouri Supreme Court Rule 27.02(f) and Section 546.070(2), RSMo 1994.

The opening statement is an essential stage of the trial, for both the State and the defense. As Justice Berger recognized, the opening statement is necessary to advise the judge and jury as to "what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole." U.S. v. Dinitz, 424 U.S. 600, 612, 96 S.Ct. 1075, 1082 (1976) (concurring opinion). This Court too has recognized that the opening statement is needed to "inform the judge and jury of the general nature of the action so as to enable them to understand the case." Hays v. Missouri Pac. R. Co., 302 S.W.2d 800, 804 (Mo. 1957).

The right to make an opening statement is recognized by Missouri statute and Supreme Court Rule. Section 546.070 provides that:

> The jury being impaneled and sworn, the trial may proceed in the following order:
>
> (1) The prosecuting attorney must state the case and offer the evidence in support of the prosecution;
>
> (2) The defendant or his counsel may then state his defense and offer evidence in support thereof; . . .

Missouri Supreme Court Rule 27.02(f) reiterates that, "the attorney for the state shall make an opening statement. The attorney for the defendant may make an opening statement or it may be reserved."

This Court has never dealt with the question now before it – whether it is fair to the defendant and the jury to impose an absolute ban preventing defense counsel from advising the jury in opening statement of evidence it intends to elicit through cross-examination of the State's witnesses.

I. Emergence of the Absolute Ban

A line of cases imposes an absolute ban on such opening statements, labeling them as inherently argumentative. Although these cases claim legitimacy based on several cases of this Court, the unwarranted extension of those holdings has created a progeny neither expected nor warranted.

A. The Supreme Court Cases

Two holdings by this Court have little to do with the instant issue, yet form the foundation for the line of cases that bar defense counsel from commenting on evidence

elicited through cross-examination. The first of these cases is Hays v. Missouri Pac. R. Co., 304 S.W.2d 800 (Mo. 1957), which dealt solely with whether the plaintiff had made a sufficient opening statement so as to avoid a directed verdict. In a suit for monetary damages, the plaintiff gave an opening statement that lacked details regarding her claims of false imprisonment and conspiracy to deprive her of personal liberty. *Id.*, at 802. The trial court sustained the defendant's motion for a directed verdict based solely on the lack of detail and ambiguity of the opening statement. *Id*., at 803.

This Court reversed, holding that, "the primary purpose of an opening statement is not to test the sufficiency of plaintiff's anticipated evidence, but is to inform the judge and the jury in a general way of the nature of the action so as to enable them to understand the case and to appreciate the significance of the evidence as it is presented." *Id*., at 804. The Court stressed that the trial court should grant counsel "considerable latitude" in making opening statement. *Id*. It concluded that, "it is readily apparent that mere insufficiency of the opening statement to recite facts which show that plaintiff's anticipated evidence would, as a matter of law, present a submissible case, is not of itself standing alone sufficient justification to stop the case at that stage and direct a verdict for the defendant." *Id*., at 804-805.

Next, in State ex rel. State Highway Commission of Missouri v. Fenix, 311 S.W.2d 61, 65 (Mo. 1958), this Court considered whether the defendant's failure to object to the mention of an issue in opening statement waived any objection to the issue. This Court reiterated the purpose of an opening statement:

> An opening statement is an outline of anticipated proof, a forecast of what counsel expects the testimony to show, and its primary purpose is to acquaint the judge and the jury in a general way with the nature of the case at bar, not to test the sufficiency or the competency of evidence which may or may not be admitted when offered.

Id. This Court held that defense counsel's failure to object to the plaintiff's opening statement did not serve as a waiver of any later objection to the competency of the evidence. *Id*.

Thus, the holdings of these two cases are simply that (1) the plaintiff need not set forth every fact within the opening statement to establish the sufficiency of his case; and (2) counsel need not object in opening statement to the mention of evidence which may not be competent, in order to preserve a later objection to the incompetent evidence. From these limited holdings, a line of cases have developed which hold that defense counsel's opening statements may not comment on any evidence elicited in cross-examination of State witnesses, since that evidence implicitly challenges the competency or sufficiency of the State's case.

B. The Progeny

The first case to impose limitations on defense counsel's opening statement relied on the Hays and Fenix holdings. In State v. Fleming, 523 S.W.2d 849, 851 (Mo. App. 1975), defense counsel attempted to make an opening statement at the end of the State's case setting forth his theory of the case, based on facts that he had already elicited through cross-examination of the State's witnesses. Defense counsel had no further

evidence to present. *Id*. The trial court interrupted counsel and instructed him to set forth his evidence, not his theory, since his theory would constitute improper argument. *Id*.

Citing Hays and Fenix, the Court of Appeals for the Eastern District set forth the basic principles guiding opening statements. *Id*., at 852-53. It stressed that opening statements should be limited to those facts that can be proved and exclude any facts that are plainly inadmissible. *Id*., at 853. It recognized that an opening statement is important to allow defense counsel to outline the defense "so that the jurors may more intelligently follow the testimony as it is related by the witnesses." *Id*., *citing* Foster v. United States, 308 F.2d 751, 753 (8th Cir. 1962). The appellate court acknowledged that the Missouri Supreme Court rules give defense counsel "the same right and latitude as the prosecuting attorney under the principles relating to an opening statement." *Id*. While citing an American Bar Association standard for the proposition that an attorney must confine his opening statement to the evidence he intends to offer, it also cited the comments to that standard, which state merely that the opening must be confined "to facts which can be proven." *Id*.

The Eastern District concluded that the trial court had not erred in denying defense counsel the opportunity to set forth his theory of defense. *Id*. It reasoned that the theory of defense was nothing more than argument regarding the weaknesses of the State's case. *Id*. The court stressed that the trial court allowed defense counsel to elicit on cross-examination the evidence favorable to the defense. *Id*. It concluded that under all the circumstances, the trial court did not err in refusing to allow defense counsel to make an opening statement to set forth his theory of the defense. *Id*.

In State v. Lankford, 565 S.W.2d 737 (Mo. App. 1978), the Court of Appeals for the Western District faced a similar issue. Prior to opening statement, defense counsel advised the court that he planned to advise the jury that one of the state's key witnesses was on probation from juvenile court. *Id*., at 739. The court barred defense counsel from mentioning this fact in opening statement, although it was elicited on both direct and cross-examination of the witness and was emphasized in closing argument. *Id*.

The Court of Appeals for the Western District, using Fleming as authority, held that the purpose of opening statement "is not to test the sufficiency or the competency of the evidence." *Id*. The appellate court held that defense counsel did not seek to outline the anticipated proof by reference to the witness' juvenile record "but merely sought to comment on the credibility of [the juvenile] as a witness", which was not a proper function of the opening statement. *Id*.

The Eastern District followed with two cases further establishing this rule. In State v. Ivory, 609 S.W.2d 217 (Mo. App. 1980), the defendant's opening statement interpreted the State's evidence and commented upon the effect of that evidence. *Id*., at 221-22. Characterizing the opening statement as argument, the Court of Appeals held that the trial court had not abused its discretion in barring the statement. *Id*., at 222. In State v. Hurst, 612 S.W.2d 846 (Mo. App. 1981), the Eastern District found no error where defense counsel's opening statement commented upon the credibility of the State's witnesses and therefore was argumentative. The court again cited Fleming for the premise that the purpose of opening statement is not to test the sufficiency or competency of the evidence. *Id*., at 853.

In State v. Bibbs, 634 S.W.2d 499, 501 (Mo. App. 1982), defense counsel commented in opening on evidence she would elicit through cross-examination of the State's witnesses. The Eastern District held that the opening statement was improper, as it related solely to the credibility of the State's witnesses. *Id*. Interestingly, the court also found no error in refusing to allow defense counsel to call the State's witnesses as defense witnesses. *Id*. The court held that because the defendant presented his case through the cross-examination of the State's witnesses, there was no need to recall those witnesses to present the same testimony. *Id*., at 501-502. *See also* State v. Gibson, 684 S.W.2d 413, 415 (Mo. App. 1984) (no error in preventing defense counsel from mentioning in opening statement the evidence he would elicit through cross-examination of State witnesses, because defendant's opening statement should be limited to evidence that defendant will produce and not argue the case or attack the credibility of the State's witnesses).

The Western District first recognized the problems with this precedent in State v. Harris, 731 S.W.2d 846, 849-50 (Mo. App. 1987). There, the defense was misidentification. *Id*., at 847. The State's case was based upon the testimony of one witness, the victim, whose description of his assailant differed radically from the defendant's appearance. *Id*., at 847-48. During opening statement, the defense described the defense evidence, including the defendant's testimony as contrasted to the State's evidence. *Id*. The prosecution objected to the opening statement on the ground that it was improper comment on what the defense hoped to elicit through cross-examination of

the State witness. *Id*., at 850. The trial court agreed that the defense could not comment on the credibility of the State witness in its opening statement. *Id*.

On appeal, however, the Western District distinguished between argument and presentation of evidence favorable to the defense:

> In this case, defense counsel did not stray across the line into argument. She made a simple statement of what defendant's evidence would be as contrasted with the state's evidence. Where as here the only issue in the case is the identification or misidentification of the defendant, defense counsel is free to point out the significance of the difference between the state's evidence and the defendant's, thus framing the issue. Here an opening statement about the evidence of defendant's true description would have been totally meaningless without reference to the contrasting evidence she could fairly anticipate the state would put on, that is [the victim's] description of his assailant. Defendant's entire defense was based upon the difference between [the victim's] description and defendant's true description. Contrasting the state's evidence with the defendant's was designed only to point out the significance of the conflict in the evidence. Although that contrast is the basis for counsel's later argument, the mere description of the evidence that is in conflict is not yet argument.

Id. (emphasis added). Because defense counsel was able to make the bulk of her opening statement before the State objected, the defendant did not suffer prejudice. *Id*., at 850-51.

In State v. Hamilton, 740 S.W.2d 208 (Mo. App. 1987), the Western District reverted back to the absolute ban. There, the State's case depended upon the testimony

of two witnesses. *Id*., at 209. When defense counsel stated in opening that one of the witnesses had been caught stealing, the State objected. *Id*. Defense counsel argued that he should be allowed to mention facts about the State's witnesses that had been brought out in depositions and that would be brought out again in cross-examination. *Id*. The trial court held that the comments went to the credibility of the State's witnesses and were argumentative. *Id*., at 210.

In a turn-around from the Harris decision, the Western District held that any evidence the defendant would develop on cross-examination of the State's witnesses was a matter of argument. *Id*., at 211. The appellate court held that the defense may only comment on the evidence it intends to produce. *Id*. The Western District recognized that the rule would prohibit a defendant from making any opening statement if he does not expect to testify or present any evidence. *Id*.

The Western District continued the precedent in the three final cases leading to the instant case. In State v. Nelson, 831 S.W.2d 665 (Mo. App. 1992), the defendant was charged with raping the complaining witness; his defense was that the complaining witness had consented to the intercourse. Defense counsel commented in opening statement that although the State alleged that there were blood stains on the wall, there was no evidence that it was actually blood; that the victim did not recall getting cut; and that she did not remember where and when the defendant had the knife and when he cut her. *Id*., at 666. The court sustained the State's objection. *Id*. The Western District held that the defense may not make opening statement on evidence that will be elicited during cross-examination. *Id*. The Western District held that defense counsel was arguing the

competency of the State's evidence and the credibility of the witness. *Id*. It held that any evidence gleaned from cross-examination is "a matter of argument and improper." *Id*., at 667. *See also* State v. Robinson, 831 S.W.2d 667, 670 (Mo. App. 1992) (opening statement that the victim used drugs, hung around a pimp, and had stolen money from the defendant, lied to him, and interfered with his job could best be described as argument).

Finally, in State v. Flaaen, 863 S.W.2d 658 (Mo. App. 1993), the defendant did not call any witnesses to testify, but cross-examined the State's witnesses. During defense counsel's opening statement, the State objected to defense counsel's comments challenging the true content of what the defendant told the police, and to comments regarding what a State witness observed. *Id*., at 660. Both objections were sustained. *Id*.

Citing Fleming, the Western District held that, "most opening statements made by defense counsel when no defense evidence is to be offered will frequently result in an attack on the credibility of the state's witnesses or argument of the facts of the case, neither of which serves the purpose of the opening statement." *Id*. While the State is obligated to make an opening statement, the defendant is not. *Id*., at 661. When the defendant makes an opening statement, he cannot "argue the sufficiency of the state's evidence or the credibility of its witnesses." *Id*., *citing* Ivory, 609 S.W.2d at 221-22.

II. The Instant Case - Defense Counsel Should Have Been Allowed to Make an Opening Statement

Prior to opening statements, the State filed a motion *in limine* asking the court to limit defense counsel's opening statement to evidence that the defense planned to elicit in

the defense case (L.F. 15-17). The State urged the court to prevent the defense from making a statement regarding evidence that would be elicited by the defense during cross-examination of the State witnesses, even though the defense had also subpoenaed those witnesses (L.F. 15-17).

Defense counsel argued that she should be allowed to make an opening statement based on the evidence that she intended to elicit through witnesses that the defense had subpoenaed to testify, but who were also subpoenaed by the State (Tr. 182). She argued that many of the State witnesses would also provide exculpatory evidence for the defense and thus they had been subpoenaed by the defense (Tr. 183). Defense counsel argued that, merely because the State presents its evidence first, does not mean that all its witnesses are exclusively State witnesses (Tr. 184). To limit the defense opening statement in such a case would allow the State to prevent the defense from making any opening statement by calling all the defense witnesses as "State" witnesses (Tr. 184).

Defense counsel listed examples of what she hoped to detail for the jury (Tr. 185-86). First, she discussed Bruce's sister, Edwinna Thompson (Tr. 182). Defense counsel advised the court that Edwinna could be considered either a defense witness or a State witness, and that, if the State did not call her to testify, the defense would (Tr. 182). Next, she advised the court that certain of the "State" witnesses would provide testimony that would also help the defense (Tr. 185-86). The defense anticipated that crime scene technician Van Ryn would testify that the police searched for evidence in Bruce's car yet could not find anything, and that fingerprints taken during the investigation did not match Bruce's fingerprints (Tr. 185). Defense counsel noted that William Newhouse, at the

Kansas City Crime Laboratory would testify that he analyzed the bloody footprints taken from the crime scene and that they didn't match any shoes that were provided to him (Tr. 185-86). Defense counsel argued that these facts would exculpate Bruce, whether or not they were elicited during cross-examination (Tr. 185-86). Defense counsel also argued that it had subpoenaed these witnesses, but the State had also subpoenaed the witnesses (Tr. 182-83).

The State argued that by apprising the jury of exculpatory facts, the defense would be arguing its case (Tr. 186). The State suggested that the defense make its opening statement after the State's case concluded (Tr. 186-87). Defense counsel responded that doing so would force the defense not to cross-examine any of the "State" witnesses and then to recall those witnesses as defense witnesses in the defense case (Tr. 187-88). The court recognized that such an action would probably violate Bruce's right to confront the witnesses against him (Tr. 187). Defense counsel concluded that it should not be barred from presenting its version of the competent evidence that would be brought out during the course of the trial, merely because the State was required to proceed first (Tr. 188-89). The court lamented that its hands were tied due to the current state of Missouri caselaw and sustained the State's objection (Tr. 188).

The State then made a twenty-five page opening statement (Tr. 194-219).

Defense counsel approached the bench and asked for the opportunity to apprise the jury of evidence that would be brought out during the course of the trial that was not mentioned in the State's opening statement (Tr. 219). The court held that, as long as the State was calling the witnesses, the defense could not make any sort of comment in

opening as to what evidence those witnesses would provide (Tr. 220). Defense counsel restated her opposition to the State's motion in limine, but the court abided by the same ruling given previously (Tr. 219-21).

Defense counsel then gave a four line opening statement, advising the jury that there was much more evidence and asking the jury to wait to hear all the evidence before deciding guilt or innocence (Tr. 221). The State objected to the opening statement, and the objection was sustained (Tr. 221).

Bruce appealed his convictions to the Court of Appeals for the Western District (L.F. 55-58). In an *en banc* decision, the Court of Appeals held that the trial court erred in barring defense counsel from making an opening statement, but that Bruce did not suffer prejudice warranting a reversal. State v. Thompson, 2001 WL 603529, at 8-10 (June 5, 2001). The Court of Appeals recognized that both the Eastern and Western Districts had "created an absolute rule that *any* evidence defendants intend to elicit on cross-examination of the State's witnesses constitutes argument, and, therefore, cannot be mentioned in opening statements." *Id*., at 6 (emphasis in original). The Court of Appeals concluded that the absolute rule precluding defense counsel from making an opening statement regarding factual evidence it intends to elicit on cross-examination of State witnesses goes beyond the prohibition against argument in opening statements. *Id*., at 8. The Court of Appeals held that its prior decisions that espoused such a rule, including Flaaen, Nelson, and Hamilton, should no longer be followed. *Id*. The appellate court found that Bruce did not suffer prejudice by the court's denial of an opening statement, however, because defense counsel was able to thoroughly cross-examine the witnesses

regarding the facts underlying the defense theory and emphasize the significance of that evidence in closing argument; and since the defense theory was not so complex as to require advance "elucidation." *Id*., at 9-10.

III. Policy Considerations Mandate That the Absolute Ban be Abolished

"The primary function of the opening statement is to inform both the court and the jury in a general way of the nature of the case and to outline the anticipated evidence and the significance of that evidence." Flaaen, 863 S.W.2d at 660-61, *citing* Fleming, 523 S.W.2d at 852; *see also* Robinson, 831 S.W.2d at 670; Nelson, 831 S.W.2d at 666. The attorney should limit the opening statement "to a brief outline of the issues and the matters which counsel believes the competent and admissible evidence will support." Harris, 731 S.W.2d at 849-50.

To effectuate these goals, counsel is permitted great latitude in making an opening statement. Hays, 304 S.W.2d at 804; *see also* Giles v. American Family Life Ins. Co., 987 S.W.2d 490, 493 (Mo. App. 1999). To this end, the courts have allowed prosecutors to refer to a defendant as a bum if the facts of the case show that he was in fact, an indigent transient, State v. Gartrell, 171 Mo. 489, 71 S.W. 1045 (1903), to brandish a butcher knife alleged to be defendant's, State v. Luallen, 654 S.W.2d 226, 228 (Mo. App. 1983), and to employ a degree of dramatics, State v. Edmonds, 347 S.W.2d 158, 164 (Mo. 1961). The latitude that has been granted to prosecutors should also be granted to defense counsel.

A. Facts Are Distinguishable From Argument

While argument is not allowed in opening statement, not every fact to be elicited on cross-examination can be considered argument. The Western District recognized this distinction in Harris, 731 S.W.2d at 849-50, and again in this case. The defendant should be free to "point out the significance of the difference between the State's evidence and the defendant's, thus framing the issue. . . . The mere description of the evidence that is in conflict is not yet argument." Harris, 731 S.W.2d at 850.

In Bruce's case, the trial court's ruling failed to distinguish between argument relating to the credibility of the State witnesses and proper narrative of what evidence the defense would elicit through the course of the trial. The court denied Bruce the opportunity to advise the jury of any evidence that would be elicited on cross-examination, whether it related to the credibility of the State witnesses or related to relevant, competent evidence. The court basically equated all evidence that would be elicited on cross-examination with argument.

Argumentative opening statement, however, is entirely different from an opening statement which relates relevant, competent evidence elicited through cross-examination of the State witnesses. Merely because evidence supports the defense does not make that evidence argumentative. Just as the State is allowed to present an outline of the evidence that supports conviction, so too the defense should be allowed to set forth an outline of the evidence that supports acquittal. That, after all, is precisely the purpose of an opening statement.

B. The Absolute Ban Strips Judges of Their Discretionary Role

Trial courts are supposed to have broad discretion over the conduct of opening statements. State v. Brooks, 618 S.W.2d 22, 24 (Mo. 1981). The appellate court may not disturb the trial court's ruling absent an abuse of discretion. *Id*. Under the current state of Missouri law, however, the trial court has no discretion. It must bar defense counsel from making an opening statement regarding any matter to be elicited in cross-examination. It has no discretion to distinguish between facts and argument. Thus, the trial court expressed that it had no choice but to prevent defense counsel from making an opening statement (Tr. 188). This absolute bar strips judges of their proper discretion.

C. The State Should Not Unfairly Benefit

Under the interpretation of the law that the trial court imposed upon Bruce, the State may willfully preclude a defendant from making an opening statement. When the defense endorses its witnesses, the State may in response, subpoena the same witnesses. Now, those witnesses are considered "State" witnesses, and the defense cannot make an opening statement as to what those witnesses would relate at trial. The State even has the added benefit that if those "State" witnesses do not cooperate, the State may ask to treat the witnesses as hostile and thereby ask those "State" witnesses leading questions. Alternatively, the State may decide as the trial progresses not to call those witnesses after all; thus, the defendant would have been kept from mentioning the testimony of those witnesses in opening statement, even though those witnesses end up as "defense" witnesses. By its unilateral actions, the State would prevent the defendant from making an opening statement at the outset of the trial. The jury would be left with the State's

version of what the evidence will be, without a glimmer of what the defense anticipates it will present.

Potentially, the defense could choose not to cross-examine any of the State witnesses, so that the defense would be able to recall those witnesses as "defense" witnesses. As the trial court recognized, however, forcing the defendant to abandon his right to confront and cross-examine the witnesses against him would violate his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 18(a) of the Missouri Constitution (Tr. 187).

Additionally, even that avenue has been cut off for the defense. In Bibbs, 634 S.W.2d at 501-502, the Court of Appeals for the Eastern District held that a defendant may not choose to call the "State" witnesses as his own in order to make an opening statement about the testimony to be elicited from those witnesses. Because the defense elicited testimony from the State witnesses during cross-examination, the Eastern District found that the trial court did not abuse its discretion in barring the defense from calling those witnesses again as part of the defense case. *Id*. As the trial court noted in this case, current caselaw puts the defendant in a position where he is just stuck, denied the ability to present any meaningful opening statement (Tr. 188).

Judicial economy favors allowing defense counsel to make an opening statement relating to evidence to be presented in cross-examination of the State's witnesses. If the defense were forced to call the State's witnesses as its own, the defendant would be forced to forego his opportunity to confront and cross-examine the State's witnesses. This practice would force witnesses to be detained while the trial proceeds. It would

prejudice the defense, since the witnesses would be disgruntled with having to testify "twice" and the jurors would perceive that the defense was being repetitive. It would also unduly extend the duration of trial for no valid purpose.

D. No Witness Should be Considered Exclusively a "State" or "Defense" Witness

In most circumstances, witnesses can be considered both "State" witnesses and "defense" witnesses. And, in reality, witnesses are not supposed to favor one side over the other – they merely are supposed to relate the facts they know. Characterizing the witnesses as either "State" or "defense" serves no valid purpose.

This case is a perfect example of a situation where witnesses should be considered neutral, rather than "State" or "defense." Bruce's sister, Edwinna, could be considered a State witness, since she testified that Bruce dropped his baby at her house on the night Lynn was murdered and then unexpectedly did not pick the baby up (Tr. 512-14). Edwinna, however, also provided defense testimony, since she testified that when Bruce dropped the baby off, he was calm, and he did not have any blood on him or his clothing, nor did he have any scratches or cuts (Tr. 523-24). This testimony directly contradicted the State's theory that Bruce must have cut his hand during the murder (Tr. 673-74).

The defense should have been allowed to advise the jury in opening statement regarding the exculpatory evidence that Edwinna would provide. The State was allowed to advise the jury of the inculpatory testimony that Edwinna would provide; it is only fair that the defense should be allowed to provide the jury with the exculpatory testimony that Edwinna would provide. Merely because testimony helps the defense does not make an outline of that evidence argumentative.

The defense also should have been allowed to outline for the jury the exculpatory evidence that was elicited through various crime scene technicians and experts. These witnesses provided testimony that aided both the State and the defense. For example, the jury should have been apprised during opening statement that evidence would be presented that Bruce's car was searched for evidence of his alleged crimes, but that none was found (Tr. 484, 486, 491, 656, 691). The jury should have heard that fingerprints lifted from the house did not match Bruce or Lynn (Tr. 364-65, 473-75). The jury should have heard that the police were not able to match the bloody footprints to any pair of shoes provided to them (Tr. 359, 502, 597-98). These are facts based on relevant, competent evidence that would be (and actually were) produced at trial. It is irrelevant whether the facts would be elicited during direct examination or cross-examination. These facts do not magically transform from relevant, competent evidence into argument simply because they help the defense case and are elicited on cross, rather than on direct examination.

IV. This Court's Solution

This Court should take a hard look at the current status of Missouri caselaw regarding the right of the defense to make an opening statement. Evidence elicited during cross-examination is not intrinsically argumentative. It typically contains much more than mere critique of the State witnesses. Relevant, competent evidence is also elicited on cross-examination. The defense should be allowed to outline that relevant, competent evidence for the jury in its opening statement.

The solution is to allow the defense to mention in opening statement any facts that it would elicit if it were allowed to present evidence first. We need to presume that the witnesses are not "State" or "defense" witnesses, but just witnesses who have factual information that can benefit either side. If the defense were allowed to present its evidence first, what evidence would it want to present from the witnesses? Thus, in a case where the defense is mistaken identity, the defense would want to show that the complaining witness could not make a visual identification because she was blind; in a case dependent on the credibility of a "snitch" witness, the defendant would want to present evidence that the witness had received an excellent deal in exchange for his testimony; and in a case dependent on circumstantial evidence, the defendant would want to expose the facts that defeat the circumstantial evidence. These are all facts that are relevant and competent evidence; merely because they are elicited on cross-examination does not render them inherently argumentative or improper.

The State will complain that it is unfair to allow the defense to comment on matters elicited through cross-examination of the State's witnesses, when the State is not allowed to comment upon evidence elicited through cross-examination of defense witnesses. By this solution, however, both sides are treated the same, because both sides present an opening statement as if that side were presenting its evidence first. The State has the opportunity in opening statement to put forth its case against the defendant, and the defendant then has a chance to instill reasonable doubt by putting forth its best facts.

No valid policy is served by preventing the jury from knowing the nature of the defense case. The jurors are entitled to know of the relevant, competent evidence that

will be presented at trial, regardless of whether that evidence is elicited on direct or cross-examination. Both the State and the defense can object during the course of opening statement to argumentative comments that are made. Allowing both parties to make opening statements, regardless of when the evidence will be elicited, properly advises the jury, in a general way, of the nature of the case. To hold otherwise gives the State a fundamentally unfair advantage over the defense.

V. Denial of Opening Statement Was a Structural Error Warranting Retrial

The State gave an opening statement which spanned over twenty-five pages of the trial transcript (Tr. 194-219). In contrast, the defense was allowed to make a four-line opening statement (Tr. 221). All the defense could apprise the jury of was that there was more evidence than that set forth by the State and to ask the jurors to keep an open mind (Tr. 221). The purpose of opening statement was thwarted, since the jury was left to wonder about the nature of the evidence to be presented by the defense. It also implied to the jury that the defense had no solid evidence on its side - after all, it is only natural that the jury would believe that if there were any good facts for the defense, those facts would have been set forth in the opening statement.

The trial court's error in denying defense counsel the ability to make an opening statement was a structural defect that undermines confidence in the outcome of the trial. A structural defect affects "the framework within which the trial proceeds, rather than [being] simply an error in the trial process itself." Arizona v. Fulminante, 499 U.S. 279, 307-10, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); State v. Storey, 986 S.W.2d 462, 464

(Mo. 1999). It differs from mere trial error, whose effects can be quantitatively assessed. Fulminante, 499 U.S. at 307-308.

The error in denying the defense the opportunity to make an opening statement affected the framework of the trial itself. Its effects cannot be quantitatively assessed, because it influenced the very means by which the jurors heard and evaluated the evidence. Opening statements have been described as a roadmap, directing the jury how it should assess evidence and head to the right destination, whether it be conviction or acquittal. They have also been described as the completed picture of a jigsaw puzzle, which helps the jury put together the pieces of evidence into a picture that makes sense.

In Bruce's case, the jury received an elaborate roadmap, or a blownup picture, of the State's case, but was left without a clue as to what the defense case would be. As the evidence was presented, the jury had no idea how to assess and characterize the tidbits of information it received, other than in the manner the State presented. The defense theory was a mystery. Would this be a case where the defendant alleged that he acted in self-defense? Or would he allege that another person did it, the ex-husband perhaps? Would the defense allege that the State merely lacked enough evidence against the defendant? What relevance should it give to the fact that Edwinna noticed no blood on Bruce's hands? The absence of blood on Bruce's hands perhaps would hurt Bruce, if it were a self-defense case; yet if Bruce were claiming he had no involvement at all, this would be a good fact for the defense. As defense counsel elicited testimony from the various crime scene technicians and criminologists, the jurors did not know how these tidbits fit together. Also, since the jurors did not know the type of information that they should be

looking for, they very well may have missed it. After all, defense counsel most likely would need to ask a number of questions before reaching the essential points of interest to the defense; if the jurors do not know what the defense is, however, they may overlook the import of the evidence that is elicited.

The State must have understood the overwhelming significance of having the jury hear just its side of the case before hearing and assessing the evidence. The State fought emphatically to keep the defense from making an opening statement. The logical query is, why? The State stood a lot to gain by having the jury left in the dark on the defense case. Either the State was aware that an opening statement by the defense would be hard to counter, or it knew that it would gain a huge advantage by being the only party to give the jury an outline of the case. After all, studies have shown that up to 80% of jurors have irrevocably made up their minds by the end of opening statements. L. Timothy Perrin, *From O.J. to McVeigh: The Use of Argument in the Opening Statement*, 48 **Emory L.J**. 107, 124, fn. 104 (1999) (listing various studies and articles supporting this statistic). The State knew that the jurors would be left with the impression that, if the defense had any worthwhile evidence, it would have stated so in its opening statement, and that since defense counsel did not state what the evidence was, the defense must have nothing.

A. The Court of Appeals' Finding of No Prejudice

The Court of Appeals for the Western District found that denying the defense the opportunity to give any opening statement, after the State gave a twenty-five page opening statement, was not prejudicial. Thompson, 2001 WL 60529, at 8-10. It held that

in cases where the defendant has been denied the ability to make opening statement, no prejudice has been found where (1) defense counsel was able to cross-examine the witnesses regarding the facts underlying the defense theory and emphasize those facts in closing argument; and (2) the defense theory was not so complex as to require "advance elucidation." *Id*., at 9-10. The appellate court cited two cases to support this contention: Wright v. United States, 508 A.2d 915 (D.C. App. 1986) and United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982).

In Wright, however, defense counsel did set forth the theory of defense in her opening statement before she was cut short. 508 A.2d at 518. She was allowed to inform the jury that no witness had seen the defendant enter or leave the burglarized premises and that none of the stolen property was recovered from the defendant. *Id*. It was only when defense counsel started to inform the jury that the description of the stolen items had changed, that defense counsel was cut short. *Id*.

The appellate court found that the trial court had erred in limiting defense counsel's opening statement. *Id*., at 919. It held that the error was harmless, however, since defense counsel thoroughly cross-examined the witnesses and raised the issues again in closing argument; the defense theory was not difficult to understand; and defense counsel "did give an abbreviated opening statement and received the opportunity to make a supplemental opening statement before presenting the defense, but declined to do so." *Id*., at 921 (emphasis added).

In Hershenow, the appellate court held that the trial court had erred in refusing defense counsel the opportunity to make an opening statement. 680 F.2d at 858. In

finding that the error was harmless, the appellate court cited two factors: (1) the defense theory was not new or complicated so as to require advance elucidation; and (2) the government's opening was simple and short and defendant's theory of defense therefore was predictable. *Id*., at 859 (emphasis added).

Bruce's case is distinguishable from Wright and Hershenow. Unlike Wright, Bruce was not allowed to apprise the jury at all as to what his defense would be. Defense counsel was able to tell the jury only that there was much more evidence and plead with it to wait to hear all the evidence before deciding guilt or innocence (Tr. 221). The jury was left to believe that the defense must have nothing, if that is all it could state in opening. And unlike Hershenow, the State's opening statement was very, very long, filling twenty-five transcript pages. Defense counsel's opening statement, in contrast, was four lines, and even that drew an objection, which was sustained!

B. Other Courts Have Found Reversible Error

Other courts have found reversible error from the denial of the right to make an opening statement. In Arriaga v. Texas, 804 S.W.2d 271, 272 (Tex. Crim. App. 1991), defense counsel wished to make an opening statement right after the State gave its opening statement. The court denied the request but stated that defense counsel may make its opening after the State presented its evidence. *Id*. Defense counsel refused. *Id*.

The Texas Court of Appeals held that the trial court had erred in refusing defense counsel the ability to give an opening statement right after the State gave its. *Id*. Just as in Missouri, court rules allow defendants in Texas to make an opening statement immediately following the State's opening statement. *Id*., at 273. The case was not

complicated – a delivery of heroin charge; the main point in contention was the credibility of an undercover officer. *Id*., at 276. Reversing, the appellate court held that it could not conclude that the error in denying opening statement made no contribution to the conviction:

> By not being allowed to state the nature of the defense relied upon and the facts expected to be proved in their support before the State presented its evidence, appellant was not able to have the jury evaluate the State's evidence in the context of the defense position as that evidence was being heard. Additionally, appellant was not able to have the jury relate the defense cross-examination of the State's witnesses to the overall defense posture as the cross-examination was being conducted.

Id.

In Lawrence v. Texas, 1997 WL 627616 (Tex. Crim. App., Oct. 13, 1997; unpublished), the defendant was charged with aggravated delivery of methamphetamine. After the State waived its right to give an opening statement, the trial court refused to allow the defense to give an opening statement. *Id*., at 4. The appellate court found that the trial court erred and that the error could not be considered harmless:

> We conclude that we cannot discern with reasonable certainty the full impact of the complete denial of such a valuable right and we conclude that we are unable to conduct a meaningful harm analysis in this case. Therefore, we presume the error was harmful.

Id.; *see also* Farrar v. State, 784 S.W.2d 54, 56 (Tex. App. – Dallas, 1989) (finding denial of right to make opening statement is per se reversible error, even if not objected to at trial) (overruled to extent that there must be objection, Dunn v. State, 819 S.W.2d 510, 524 (Tex. Crim. App. 1991)).

C. A New Trial Is Mandated

Under the holding of the Court of Appeals, will there ever be a case where this error warrants reversal? In every case, defense counsel will cross-examine witnesses to elicit testimony favorable for the defense. In every case, defense counsel will stress those points in closing argument. The Court of Appeals basically holds that, unless a case is "complicated," there can never be prejudice from the denial of an opening statement. This case involved fifteen witnesses and testimony elicited over the course of three days. Throughout these three days, the jury had no idea how to assess whether the evidence hurt or helped the defense. The first time that the jurors learned of the defense theory was on the fourth day of trial. By that time, the jury had already heard the State's twenty-five page opening statement and the State's initial closing argument, and would hear again from the State in its rebuttal closing argument.

Both the State and the defense have three opportunities to speak directly to the jurors: in voir dire, opening statement, and closing argument. In this way, trial is like a three-legged chair. Once one of those legs is knocked out, the chair cannot stand. Bruce's conviction cannot stand, because it is the result of an unfair trial. By denying defense counsel the ability to give an opening statement, the State was allowed to predispose the jurors to convict, in a case based solely on circumstantial evidence.

Because the prejudice from this error infected every stage of the trial, this Court must grant Bruce Thompson a new trial.

ARGUMENT III

The trial court plainly erred and abused its discretion in failing to declare a mistrial *sua sponte* during the State's closing argument when the assistant prosecuting attorney urged the jurors to consider facts that were neither in evidence, nor could they be considered reasonable inferences from the evidence, in violation of Bruce's right to due process of law, to confront and cross-examine the witnesses against him, and to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution, in that the State urged the jurors to believe that the pager found in Bruce's car was Lynn's pager taken by Bruce after he killed Lynn so that he could keep track of who was trying to reach her while he was disposing of the evidence of his crime. None of this wild allegation was supported by the evidence at trial, yet the jurors obviously must have considered it in finding Bruce guilty, since they requested clarification of the issue during their deliberations.

The trial court plainly erred and abused its discretion in failing to declare a mistrial *sua sponte* during the State's closing argument when the assistant prosecuting attorney urged the jurors to consider facts that were neither in evidence, nor could they be considered reasonable inferences from the evidence. The State far exceeded the permissible range of argument by arguing that the pager found in Bruce's car was Lynn's pager, which Bruce took after killing her so that he could keep track of who was trying to

reach her while he was disposing of evidence of his crime (Tr. 750-51, 764). By allowing the State to urge the jurors to consider facts not in evidence, the trial court deprived Bruce Thompson of his rights to due process, to confront and cross-examine the evidence against him, and a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.[3]

During the trial, the State elicited evidence that Lynn did not have a telephone, so she typically carried a pager (Tr. 302-303). If anyone wanted to reach her, he or she could page Lynn and Lynn would return the call (Tr. 303). The State also elicited that the police found a pager in Bruce's car (Tr. 484). Although the State presented testimony from Lynn's son and mother, no evidence was presented that the pager found in Bruce's car actually belonged to Lynn.

During the closing argument, the State urged the jurors to believe:

> Now I want to talk about what he does after the murder. Again, these are important details. What does he do with her? He covers her up with a sheet, probably one of the sheets she just finished cleaning. Because if you look at the photographs, there's a New Kids on the Block sheet, one of them that was on Wesley Thompson's bed. He covered her up. Why did he do that? Well, how about this? He does that because he wants to buy himself as much time to take care

[3]Bruce Thompson acknowledges that his attorney did not timely object to the State's argument. He therefore requests that this Court review this issue for plain error pursuant

of everything. If he covers up her body and makes her look like a pile of laundry laying there, like Officer Disciacca said. If somebody just happens to pop in and look, and go right back out, calling her name out. When they open the door, they'll just see a bunch of laundry on the floor. Isn't that what happened? Officer Disciacca said that.

What about this, the pager? If you look in those photographs, there was no pager, no pager recovered by Kim Orban. Where was the pager? Well, I don't know. Look at the pictures. That Volvo that they processed, on the floor in the front by the passenger side, there was a pager laying there. Why would he take something like that? What happens when the pager is going off? It starts making noise, right? Who is going to be paging Lynn Thompson? The people who are looking for her. There was no phone service at the house. The pager is how they do it, how they get a hold of her. Again, that's another thing that he removes, just kind of thinks: Oh, I had better get rid of that because I don't want anybody to find her real quick because somebody is going to be looking at her real soon. Again, we have the time frame problem he has. He takes the pager.

(Tr. 750-51). Later, the State again urged the jury to believe:

She's due at her mother's house, like she is every other Sunday. She hasn't shown up. He knows that they're counting on her being there and that they're going to miss her as soon as she doesn't show up. He has got to leave the house at seven o'clock. It's past time for her to be there. He has got to move. He has got to get the

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to Missouri Supreme Court Rule 30.20.

baby out of there. He has got to get rid of the murder weapon, his shoes, clothes, anything that may have any blood on it, towels, paper towels, anything like that, he has got to get rid of that stuff and get out of there.

What does he do? He wants to buy as much time as he can. He takes the pager, covers her body, puts the pager in the car, shuts the car door, locks it, runs and takes the child to his sister's.

(Tr. 763-64). Despite the State's argument, absolutely no evidence was presented at trial that the pager in Bruce's car belonged to Lynn. Although the State presented evidence from Lynn's son and her mother, people who presumably would recognize Lynn's pager, the State failed to ascertain from those witnesses whether the pager found in Bruce's car was Lynn's pager.

Those accused of a criminal offense must be afforded a fair trial, and both the trial court and the prosecutor have a duty to ensure he receives it. State v. Tiedt, 357 Mo. 115, 206 S.W.2d 524, 526 (Mo. banc 1947); *see also* State v. Schwer, 757 S.W.2d 258, 265 (Mo. App. 1988). Bruce Thompson acknowledges that his attorney did not object to the arguments challenged herein; however, improper closing arguments can inject such "poison and prejudice" into a case that relief under plain error is necessary." State v. Burnfin, 771 S.W.2d 908, 912 (Mo. App. 1989). Plain error review is warranted where "the alleged error so substantially affects the rights of the accused that a manifest injustice or a miscarriage of justice inexorably results, if left uncorrected." State v. Hadley, 815 S.W.2d 422, 423 (Mo. banc 1991); Rule 30.20. This recognizes that trial

courts are obligated to act, even *sua sponte*, to ensure that a defendant receive a fair trial. *See* State v. Roberts, 838 S.W.2d 126, 131 (Mo. App. 1992).

Trial courts have wide discretion in controlling closing arguments, and they abuse this discretion when allowing clearly unwarranted and injurious arguments. State v. Thomas, 780 S.W.2d 128, 135 (Mo. App. 1989). The question is "whether the argument complained of was so offensive as to deprive [appellant] of a fair trial." United States v. Lewis, 547 F.2d 1031, 1036-1037 (8th Cir. 1976) (citation omitted).

As the State's representative, the prosecutor must remain impartial, as his role is not to seek a conviction at any cost but, rather, to seek justice. State v. Storey, 901 S.W.2d 886, 901 (Mo. banc 1995). "Arguments delivered while wrapped in the cloak of the state authority have a heightened impact on the jury. For this reason, misconduct by the prosecutor, normally an elected public official, must be scrutinized carefully." Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985), *citing* Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed.2d 1314 (1934). The Eighth Circuit Court of Appeals has cautioned, "prosecutors may strike hard blows but not foul ones." United States v. Sanders, 547 F.2d 1037, 1043 (8th Cir. 1976).

In Tiedt, 206 S.W.2d at 526-27, the Missouri Supreme Court reversed a first degree murder conviction due to the prosecutor's improper arguments. The prejudice in Tiedt was so substantial that the court cautioned prosecutors against "injecting into the minds of the jury any matter which is not proper for their consideration, or which would add to the prejudice which the charge itself has produced in their minds." *Id*. at 527, *citing* State v. Horton, 247 Mo. 657, 193 S.W. 1051, 1054 (1913).

A prosecutor may not argue matters outside the evidence introduced at trial and the reasonable inferences which may be drawn therefrom. Storey, 901 S.W.2d at 900; State v. Whitfield, 837 S.W.2d 503, 513 (Mo. 1992); State v. Chunn, 647 S.W.2d 292 (Mo. App. 1983). When a prosecutor argues beyond those facts proven by the evidence, her argument "amounts to unsworn testimony by the prosecutor." Storey, 901 S.W.2d at 901. The trial court must not allow the prosecutor to "misstate or otherwise pervert the evidence." State v. Robinson, 849 S.W.2d 693, 697 (Mo. App. 1993), *citing* State v. Fuhr, 660 S.W.2d 443 (Mo. App. 1983).

It is improper for the prosecutor to suggest in closing argument that he has special knowledge of facts, not in evidence and unavailable to the jury, that point to the defendant's guilt. State v. Anthony, 577 S.W.2d 161 (Mo. App. 1979); *see also* State v. Evans, 820 S.W.2d 545, 547 (Mo. App. 1991), *citing* State v. Moore, 428 S.W.2d 563, 565 (Mo. App. 1968). Similarly, a prosecutor may not express his personal opinion or belief not drawn from the evidence. Storey, 901 S.W.2d at 901.

In Storey, the prosecutor "wonder[ed]" if he would ever accomplish as much as the victim had, expressed his feelings for the victim's family, and noted the difficulty in leaving an abusive relationship. *Id*. The Missouri Supreme Court concluded that this form of argument is irrelevant to "the jury's sentencing decision." *Id*. Compounding the error of such argument is the prosecutor's unique role in a criminal trial. *Id*.

In Evans, the prosecutor argued, over defense counsel's objection, that he would not have brought charges against the defendant if he were innocent. Evans, 820 S.W.2d at 547. The trial court sustained defense counsel's objection and instructed the jury to

disregard the improper portion of the State's argument. *Id*. Despite the trial court's attempt to cure the error, the appellate court reversed the conviction and remanded the case for a new trial. *Id*., at 548. The Evans court reasoned that because the prosecutor enjoys a "quasi-judicial position" in our society, and because the jury likely relied on the statement of the prosecutor because he was in that position, "the judge's attempts at a cure" were "inadequate and necessitated a new trial." *Id.*

In State v. Bramlett, 647 S.W.2d 820 (Mo. App. 1983), this Court reversed the defendant's conviction when the prosecutor, during closing argument, assured the jury that the State, if it believed the defendant were innocent, would "have made that known to the court and [defendant's] lawyer." *Id*., at 822. This Court held that the trial court's failure to sustain defense counsel's objection to argument that suggested facts, known to the prosecution to be indicative of defendant's guilt, but not presented to the jury, is prejudicial error warranting reversal of a conviction. *Id*., *citing* State v. Blockton, 526 S.W.2d 915 (Mo. App. 1975).

In Chunn, 657 S.W.2d at 293, the Court of Appeals for the Eastern District granted the defendant a new trial based upon the State's improper closing argument referring to matters outside the evidence. There, the defendant was charged with stealing from a hotel room. *Id*., at 293. The police never matched the tire tool found in the defendant's possession to the marks on the hotel door. *Id*., at 295. In closing argument, the prosecutor tried to explain it away by telling the jury that the tool-matching tests were expensive and time consuming, a fact not in evidence. *Id*. The appellate court reversed,

stating that the prosecutor's injection of facts outside the evidence was improper and mandated reversal. *Id*.

Bruce recognizes that plain error is only found in closing argument if the improper arguments "are determined to have a decisive effect on the jury." State v. Sidebottom, 753 S.W.2d 915, 920 (Mo. banc), *cert. denied*, 488 U.S. 975 (1988). Plain error relief as to closing arguments should be granted when the unchallenged argument had a decisive effect on the jury's determination. State v. Parker, 856 S.W.2d 331, 332-33 (Mo. banc 1993). It is appellant's burden to show the decisive significance of the prosecutor's argument. *Id.*, at 333.

The State's repeated argument must have had a decisive effect on Bruce's jury. The prosecutor's arguments did not amount to a slip of the tongue, nor were they isolated; rather, the arguments were well-orchestrated and tenacious (Tr. 650-51, 763-64). Because the State admittedly had only a circumstantial case against Bruce, the State obviously felt the need to go outside the evidence presented at trial to secure convictions against him (Tr. 88, 173, 741). The jurors furthermore paid attention to the State's repeated arguments, since it asked the court to clarify whether or not the pager found in Bruce's car belonged to Lynn (Tr. 815). Instead of advising the jury of the truth, that no evidence was presented that the pager belonged to Lynn, the court advised the jurors to remember the evidence presented at trial (Tr. 815). However, if the jurors had remembered the evidence at trial, they would have known that no evidence was presented regarding ownership of the pager, and they would not have asked the question.

A trial court has "a duty to ensure that every defendant receives a fair trial, which requires the exercise of its discretion to control prosecutorial misconduct sua sponte." Roberts, 838 S.W.2d at 131. It is more than just reasonable to assume that the prosecutor's improper arguments played a decisive role in sending Bruce to prison to serve terms of life plus fifteen years imprisonment without the benefit of a fair trial. This is manifest injustice of the highest degree, which can only be remedied by a reversal of the convictions and sentences and a remand of this cause for a new trial. Bruce Thompson therefore respectfully requests that this Court reverse his convictions and remand this case for a new trial.

CONCLUSION

For the reasons set forth above in Argument I, Appellant, Bruce Thompson, respectfully requests that the Court reverse his convictions and vacate his sentences. For the reasons set forth in Arguments II and III, Bruce Thompson requests that the Court reverse his sentences and convictions and remand this case for a new trial.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing were mailed, postage prepaid to: Mr. Gregory Barnes, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102; on the 12th day of October, 2001.

Rosemary E. Percival

Certificate of Compliance

I, Rosemary E. Percival, hereby certify as follows:

The attached brief complies with the limitations contained in this Court's Special Rule 1(b). The brief was completed using Microsoft Word, Office 2000, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 15,965 words, which does not exceed the 31,000 words allowed for an appellant's brief.

The floppy disk filed with this brief contains a copy of this brief. The disk has been scanned for viruses using a McAfee VirusScan program. According to that program, the disk is virus-free.

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